



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 4, 1993

Mr. Rick Perry
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR93-059

Dear Commissioner Perry:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 17804.

The Texas Department of Agriculture (the "department") has received a request for the loan applications of certain aquacultural enterprises that received loans or loan guaranties from the department fund through the Texas Agricultural Finance Authority ("TAFA"). Specifically, the requestor seeks "copies of all aquaculture applications that you have received . . . which resulted in the applicant(s) receiving a TAFA loan."¹ You have submitted to us the requested applications.

Pursuant to section 7(c) of the Open Records Act, we have notified the companies whose interests may be affected by disclosure of the information submitted to us for review. In response, we have received a letter from Ekstrom Enterprises ("Ekstrom"). Ekstrom contends that the requested information is protected from disclosure by either sections 3(a)(1), 3(a)(4) and 3(a)(10) of the Open Records Act.²

¹In addition the requestor seeks "any information on the TAFA program, including application procedures and eligibility requirements . . . [and] copies of the minutes of all meetings in which [successful loan applications] were discussed." Because you do not comment on this information, we assume it has been or will be made available to the requestor. See Open Records Decision No. 363 (1983).

²We did not, however, receive a response from the other notified companies. Because we have no basis to withhold the information under section 3(a)(10), the information concerning these companies may not be withheld from required public disclosure under section 3(a)(10). See, e.g., Open Records Decision Nos. 405, 402 (1983).

We turn first to section 3(a)(4). Section 3(a)(4) excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect governmental interests in commercial transactions. Open Records Decision No. 541 (1990). Neither the department nor the respondent indicates how the requested information relates to a competitive bidding situation or commercial transaction to which the department is party. Accordingly, section 3(a)(4) does not except from required public disclosure the information at issue here.

We turn next to section 3(a)(10). Section 3(a)(10) protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted under section 3(a)(10) only if it is privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991) at 9.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

This office has previously held that if a governmental body takes no position with regard to the application of the "trade secrets" branch of section 3(a)(10) to requested information, we must accept a private person's claim for exception as valid under that

submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6.³

Ekstrom states that it is the sole producer of hybrid striped bass in the state of Texas. Its application to the department includes the company's business plan, production technology, special supplier arrangements, marketing strategies, customer list, pricing information, and cash flow analyses. In addressing the Restatement criteria, Ekstrom advises that its production process is the result of a prolonged and expensive research and development program; that only one employee is privy to any of the production technology and marketing information; and that the unique nature of the requested information would be difficult, if not impossible, for others to duplicate. We conclude that Ekstrom has made a *prima facie* case establishing that the part of its application containing information revealing Ekstrom's production technology constitutes "trade secrets" and thus may be withheld from required public disclosure under section 3(a)(10) of the Open Records Act.⁴ However, we conclude that Ekstrom has not made a *prima facie* case with respect to the remainder of its application.⁵ Nor does the company refer us to any state judicial decision or statute holding such information either privileged or

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.; see also Open Records Decision Nos. 319, 306 (1982); 255 (1980).

⁴Internal operating or business information, as well as technological processes or ideas, may constitute a trade secret. See R. Callmann, *The Law of Unfair Competition, Trademarks, and Monopolies* §§ 14.06, 14.09; Annot., 59 A.L.R. 4th 641; see, e.g., *Gonzales v. Samora*, 791 S.W.2d 258 (Tex. App.—Corpus Christi 1990, no writ) (evidence supported status of business procedures and forms as trade secrets).

⁵We note that the request encompasses tax return information provided by the companies to the department. Prior decisions of this office have held that title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos 600 (1992) (W-4 forms); 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Accordingly, the requested information must be withheld from required public disclosure under section 3(a)(1) of the Open Records Act to the extent that it contains tax return information made confidential by federal statute.

confidential. Accordingly, the remainder of Ekstrom's application may not be withheld from required public disclosure under section 3(a)(10) of the Open Records Act.⁶

Finally, Ekstrom, a sole proprietorship, claims that release of the requested information implicates the common law privacy interests of the company's sole proprietor. Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 3(a)(1) of the act by the Texas Supreme Court in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing *and* is of no legitimate concern to the public. In contrast, the constitutional right of privacy protects information relating to marriage, procreation, contraception, family relationships, and child rearing and education. *See* Open Records Decision No. 447 (1986) at 4.

In Open Records Decision No. 373 (1983) (copy enclosed), this office concluded:

In our opinion, all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Generally, transactions involving loans to individuals made or guaranteed by governmental bodies are matters of legitimate public interest, and thus are ordinarily not within the protection of common-law or constitutional privacy. Open Records Decision No. 590 (1991) at 3; *see also* Open Records Decision No. 525 (1989); 480 (1987); 385 (1983). Open Records Decision No. 373 noted, however, that in certain instances there may not be an adequate demonstration of legitimate public interest to justify the invasion of the applicant's privacy. Open Records Decision No. 373. Accordingly, the availability of "personal financial information" should be addressed on a case-by-case basis. *See also* Open Records Decision Nos. 600 (1992); 545 (1990) (excepting information relating to an employee's participation in a deferred compensation plan).

⁶Eckstrom also claims that the requested information is made confidential by the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et. seq.* The federal Right to Financial Privacy Act, however, regulates only the release of financial records by financial institutions to the federal government, and consequently, is inapplicable to the release of records by a Texas state agency under the act. *See* 12 U.S.C. §§ 3401(3), 3402 - 03.

In the instant case, applicants for TAFE loan guarantees are required to submit historical balance sheets, income statements and cash flows for the previous three years. In addition, start-up businesses must also provide historical information for the principal owners of the business. Ekstrom is a start-up business. Thus, such information constitutes "the basic facts regarding a particular financial transaction between the individual and the governmental body" and as such is of legitimate interest to the public and may not be withheld from required public disclosure under section 3(a)(1) of the Open Records Act. *See* Open Records Decision No. 523 (1989). Accordingly, except for trade secret information protected by section 3(a)(10) and tax return information, the requested information must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-059.

Yours very truly,



Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/GCK/mc

Ref.: ID# 17804
ID# 18134

cc: Mr. Jose Gonzales-Falla
2907 Conway
Houston, Texas 77025

Mr. James P. Ekstrom
Owner, Ekstrom Enterprises
209 Red Fox Run
Sequin, Texas 78155

Mr. Paul Barrett
NAIAD Corporation
P.O. Box 307
Liverpool, Texas 77577

Mr. J. Robert Brown
Southwest Mariculture, Inc.
P. O. Box 6722
Corpus Christi, Texas 78466

Enclosures: Open Records Decision Nos. 226, 373, 600